United States Circuit Court of Appeals for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

FRANCIS A. GARRECHT,
United States Attorney.
PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was tried by the court under a written stipulation waiving a jury (record, p. 21), and is an action for debt in six counts for penalties for violation of the hours-of-service law (34 Stat., 1415), alleging the requirement by the railroad mentioned of excessive hours of service by six members of a train crew.

The answer was, in effect, a general denial, the only admission being that as to all counts of the

declaration the defendant was a common carrier engaged in interstate commerce by railroad.

As to each of the six employees in question the Government alleged and claimed that, on January 10, 1912, they were employed in service in specified capacities as members of a train crew from 5 o'clock a. m., until 10.30 o'clock p. m., upon its line of railroad on a certain extra train, which on said date ran from Tacoma to Cle Elum.

The railroad contends that in this case there is no violation of law because said train employees went off duty temporarily at Auburn, from 8.25 a. m. until 10 a. m., while said train was in the course of said trip from Tacoma to Cle Elum.

The circumstances as to the delay at Auburn are set forth (record, p. 29) as follows:

> The train was ordered to leave Tacoma at 6 a. m., but was delayed at that point 45 minutes waiting for an engine which had been delayed between roundhouse and yard by derailment of yard cut, and therefore did not reach Auburn until 8.25 a. m., and it was then seen by the dispatcher, the witness here, that the train would sustain a long delay at Auburn, meeting superior trains, which were No. 603, No. 41, No. 257, and let No. 4 pass, and to take advantage of a release period the crew was instructed on arrival at Auburn that they were released from duty for 1 hour and 30 minutes, so that the train could, if possible, make Ellensburg within the allowed time.

The Government claims that its case is complete in the stipulation just recited and the formal stipulation. (Record, p. 13.)

The district court ruled that a temporary release, such as is disclosed in the record, did not effectually break the continuity of service, and that the time of the delay at Auburn ought not to be deducted.

The defendant, when both parties had rested, challenged the sufficiency of the evidence and moved the court to dismiss the action. This motion was denied and the defendant duly excepted.

There was judgment for the Government on each of the six counts.

Cases relied on by the Government:

United States v. *Chicago, Milwaukee & Puget Sound Railway Co.*, 197 Fed., 624.

United States v. *Chicago, Milwaukee & Puget Sound Railway Co.*, 195 Fed., 783.

Missouri, K. & T. Ry. Co. v. *United States*, 231 U. S., 112.

United States v. *Denver & R. G. R. Co.*, 197 Fed., 629.

United States v. *Kansas City So. Ry. Co.*, 189 Fed., 471.

QUESTION INVOLVED.

In this case and in the cross appeals in Southern Pacific case (from Arizona) now pending in this court there arises the very important question as to the effect of temporary releases of a train crew en route, and whether or not such releases may permit

the retention of a train crew in service for more than 16 hours to bring the train to its terminal.

Or, in other words, when it is foreseen that a train will take more than 16 hours to reach its terminal, may a railroad, by a temporary release of the train crew for a period of time sufficient to reduce the time of active performance of duty to 16 hours, extend the time of service of such train crew for a period equal to the time covered by such release, although the full time occupied by the train between terminals is more than 16 hours?

ARGUMENT.

Freight trains ordinarily have many delays between terminals. These delays arise from a variety of causes. Unless they arise from causes set forth in the proviso in section 3 of the act the time of the service of the crew includes the time of all such delays. By a merely formal release of the crew at any or all points where such delays occur the full time taken within which service is required can not be extended to more than 16 hours without violation of the spirit and purpose of the act.

By such releases *en route* of an hour or two at one place, and the same length of time at others, the whole purpose of the act would be nullified. As was said by Judge Rudkin in *United States* v. *Chicago, Milwaukee & Puget Sound Railway Company* (197 Fed., 624):

> The facts in this case demonstrate the absurdity of the company's claim. According

> to its view of the law, it may work its employees for the full period of 16 hours; allow them 2 hours and 45 minutes off for their meals; lay them off for 3 hours at a siding in the mountains to wait for a helper; and thus leave them 2 hours and 15 minutes for sleep and recreation. Such a policy would illy protect the safety of either the employees or the traveling public.

As to a train crew attached to a train in the course of its journey between terminals, it is our contention that there can not be such a severance of the relation of the crew to the train as will prevent the application of the hours-of-service statute to such train crew for the whole time occupied by the trip.

The court may take judicial notice of the manner in which train and railroad operations are ordinarily conducted. As to the conductor and the engineer of an ordinary freight train *en route,* are they not during stops as well as during actual movement at all times responsible for train and engine?

And as to the rest of the train crew, their relations to the train under the facts disclosed in the stipulations in this case are such that they are at all times required to respond to a " call " for duty or a summons made by the engine's whistle, if any occasion arises which makes their actual service necessary during the interim of the so-called release. During such interim they still remain the designated train crew for that particular train.

Conductors and engineers are at all times responsible for the safety of their trains while such trains are en route.

The fires on the locomotive must be maintained during such a stop as the record discloses.

The train crew is responsible that brakes are set and maintained. If the delay is at a point where the train is not on a siding with the switch locked a flagman must protect the train at all times.

The record here does not disclose that these duties were discharged by any other persons than the train crew.

The facts show that in this case the release was made for the purpose of evading the law. It was made in an attempt to require service for a length of time not permitted by law. (Record, p. 29, at foot of page.)

> * * * that they were relieved from duty for 1 hour and 30 minutes *so that* the train could, if possible, make Ellensburg *within the required time.*

If such releases are given the effect by the courts which the railroad here claims, the hours-of-service law will be so weak, ineffective, and impotent that none of the purposes of Congress in its enactment will be effectuated.

The reasons applicable in case of an office or fixed station used by telegraphers regularly closed twice a day for three hours at a time, to which regular schedule operators may with some regularity fix

their habitual rest and recreation, as in the Atchison, Topeka & Santa Fe case (220 U. S., 37), have no possible application to train crews in the course of a journey between terminals who are released at irregular intervals and for periods of varying lengths of time as delays occur to the train from various causes.

Until finally and wholly released from all attendance upon that particular train, a train crew to whom there remains unperformed a duty to take the train to which they are attached to some terminal is on duty within the meaning of the hours-of-service act.

Until their attachment to a particular train in the course of its journey is entirely canceled, the members of a train crew are on duty within the meaning of the hours-of-service law.

By no other construction may the purpose and object of the law be attained.

During the time of the delay at Auburn the employees in question, although they may not have been called upon to perform any laborious service, were nevertheless on duty within the meaning of this act, because, during all this time they were required to wait at Auburn, to be ready to proceed with the train from that place at 10 o'clock. "They were none the less on duty when inactive." (*M. K. & T. Ry. Co.* v. *U. S.*, 231; U. S., 112, p. 119.) Their whole time of attendance, work, and duty was prolonged by this nominal release until it made up a

maximum of 17 hours and 30 minutes. In the case of *Missouri, Kansas & Texas Railway Co.* v. *United States,* just cited, the court said:

> But it may be observed, as was said by the Government, that as toward the public every overworked man presents a distinct danger. * * *

There is no express limitation of the operation of the act to a specific duty or any class of duties; the limitation is rather to a class of employees, namely, those " actually engaged in, or connected with, the movement " of trains. The act must, therefore, be construed as being remedial in its nature, and it must receive such construction as will give to its general purpose reasonable effect.

Chairman Knapp, now circuit judge, in formulating the decision of the Interstate Commerce Commission, March 2, 1908 (13 I. C. C. Report, 140, p. 142), said:

> The 16-hour provision which applies to all employees connected with the movement of trains, required no substantial change from previous practices because in most cases and under normal conditions of operation the hours of continuous duty were not in excess of 16. True, there were frequent instances of longer and clearly excessive hours of service, but the great bulk of the work of men handling trains in the usual course of business was performed *within the limits* of this provision. The evident object of the limitation was to reach the *exceptional cases,*

> where longer hours presumably resulted in such fatigue as to impair bodily and mental vigor and thereby produce a preventable cause of accident.

The train crew in this case were on duty within the meaning of the act, 17 hours and 30 minutes.

> *United States* v. *C., M. & P. S. R. Co.,* 195 Fed. Rep., 625.
>
> *United States* v. *Denver & R. G. R. Co.,* 197 Fed. Rep., 629.
>
> *United States* v. *C., M. & P. S. R. Co.,* 195 Fed. Rep., 783.
>
> *United States* v. *Kan. City Ry. Co.,* 189 Fed. Rep., 954.
>
> *United States* v. *Ill. Cent. Ry. Co.,* 180 Fed. Rep., 630.

The real cause of the delay to this train was "meeting trains," which cause has been held not a sufficient excuse for the detention of employees on duty for more than 16 hours.

> *United States* v. *Kansas City Southern Ry. Co.,* 189 Fed., 471; 202 Fed., 828.
>
> *United States* v. *Denver & Rio Grande Railroad Co.,* 197 Fed., 629.

It is to be noted that the record in this case discloses that this was an "extra" train, that there was delay in getting an engine for it at its initial terminal, and that before this extra was finally made up to leave Tacoma its conflict with other trains, which caused the delay at Auburn (to cover which the release was issued) could have been foreseen. As this extra was about to start the pro-

vision for its schedule, so that it should not conflict with other trains and not hold its crew on duty more than 16 hours, was one of the ordinary and usual incidents of railroad operation.

> If the usual causes of delay incident to operation were to excuse, *then the statute would be wholly ineffective to accomplish its purpose.* (*United States* v. *Southern Pacific Co.* (8th C. C. A.), 209 Fed., 562.)

It seems to follow logically that if delays naturally incident to normal operation do not excuse excess service of train employees, that a mere release issued to a train crew to cover the time of such a delay would not excuse, and for the same reason given by the eighth circuit, just cited, that if so construed "the statute would be wholly ineffective to accomplish its purpose."

Such a nominal release is in practical effect only a prolongation of the time of duty. It ought not to be deducted from the statutory period, because in reality it is an extension of the period within which duty is required. It is not a relief, but it is an added burden, because the hour of final relief from duty is thereby postponed.

CONTINUITY OF SERVICE.

In the court below and in some other decisions there has been admitted difficulty in the determination of what will break the continuity of service.

Decisions make clear that mere inactivity or cessation from active work does not break the con-

tinuity of service. (*Missouri, K. & T. Ry. Co.,* 231 U. S., 112, at 119.) If mere temporary inactivity does not break the continuity of service, why should a mere *order* for temporary inactivity break the continuity?

Releases for short periods also have been held not to break continuity.

We are not contesting the conclusion reached in these decisions.

But may there not be a clearer test than that adopted?

We submit that any temporary period of cessation from work or activity while a train is en route to its objective point is not to be deducted under the hours-of-service law if the train crew continues until their train reaches its destination, unless they are meanwhile permanently relieved from any further service on that trip.

To leave open as a question of fact, or as a mixed question of law and fact, the determination of what length of time will constitute a sufficient basis for a release which will break the continuity of service, leaves no definite, certain, and workable standard by which a train dispatcher may know when crews have reached the statutory limit of service.

As a practical matter of railroad operation the standard fixed by the law ought to be, and is, a fixed standard.

The rule which conforms to the intent of the law and effectuates its purpose and which will relieve

from all uncertainty in its application is this: A train crew, whether actually engaged in work or not, is within the meaning of the hours-of-service act always on duty until its train arrives at its destination or the crew is permanently relieved from any further work or responsibility for work upon that particular trip.

THE PURPOSE AND INTENT OF CONGRESS.

This court in the recent case of *Northern Pacific Railway Company* v. *United States* (213 Fed., 577), expressed this conclusion:

> That the intent of the act was, and is, to compel rest for each member of the train's crew at the termination of the 16-hour period *to the end that his next and succeeding hours of service may be efficient.*

The Eighth Circuit Court of Appeals in *United States* v. *Kansas City Southern Railway Company* (202 Fed., 828), said:

> This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected. (*United States* v. *Kansas City Southern Ry. Co. of Texas* (D. C.), 189 Fed.,

954.) The recovery is by a civil action, and the rules governing civil procedure apply. (*St. Louis Southwestern Ry. Co.* v. *United States* (C. C. A.), 183 Fed., 770.)

The Fourth Circuit Court of Appeals in *United States* v. *Atlantic Coast Line Railroad Co.* (211 Fed., 897), said:

> This is not a criminal statute and therefore is not governed by the rule of strict construction. (*Johnson* v. *Southern Pacific Co.,* 196 U. S., 17; *St. Louis Southwestern Ry. Co.* v. *United States,* 183 Fed., 771.) It is rather a remedial statute which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. (*Stewart* v. *Bloom,* 11 Wall., 493; *Bechtel* v. *United States,* 101 U. S., 597.) Obviously, that purpose was to promote the safety of employees and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a guide to its interpretation.

The Eight Circuit Court of Appeals, *San Pedro, Los Angeles & Salt Lake Railroad Co.* v. *United States* (213 Fed., 326), is to the same effect.

CONCLUSION.

It is respectfully submitted that the rule which is applicable to this case is that, while a train is on its way its train crew is on duty until the final terminal

is reached, and that temporary releases of such crew while in the course of a journey do not operate to release a carrier if the full time of the journey for which the crew is engaged exceeds 16 hours.

In any event, however, a release of the length of time, and for the purpose shown under the circumstances disclosed in this record, does not relieve the carrier.

Respectfully submitted.

FRANCIS A. GARRECHT,
United States Attorney.
PHILIP J. DOHERTY,
Special Assistant United States Attorney.

○